

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CYDNE M. WHITE</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,046,227
<b>CONTEMPORARY COMMUNICATIONS, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>MIDWEST INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Midwest Insurance Company (Midwest) appeals the August 10, 2010, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was found to have suffered accidental injuries with a date of accident on May 20, 2009. The insurance carrier's request to terminate authorized medical care and temporary total disability compensation (TTD) was denied.

Claimant appeared by her attorney, Phillip B. Slape of Wichita, Kansas. Respondent appeared by its attorney, Vincent A. Burnett of Wichita, Kansas. The insurance carrier appeared by its attorneys, Larry G. Karns of Topeka, Kansas, and Michael P. Bandre of Overland Park, Kansas. The Kansas Workers Compensation Fund (Fund) appeared by its attorney, Christopher Cole of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the deposition of Marc Palmateer taken October 19, 2009, with attachments; the transcript of Preliminary Hearing held October 22, 2009, with attachments; the transcript of Preliminary Hearing held May 4, 2010, with attachments; and the documents filed of record in this matter.

**ISSUES**

Midwest raises the following issues on appeal to the Board:

1. Did claimant suffer an accidental injury or compensable aggravation on June 8, 2009? Claimant, respondent and the Fund take the position that this issue is actually a dispute over the date of accident rather than whether claimant suffered an accidental injury. They then argue that the dispute over the date of accident is not an issue over which the Board takes jurisdiction from an appeal of a preliminary hearing order.
2. What is the appropriate date of accident in this matter?
3. Is the insurance company bound by the stipulations provided by respondent as to the May 20, 2009, date of accident?
4. Did claimant's injury or injuries arise out of and in the course of her employment with respondent? This issue is defended on the same grounds as issue # 1 above, with claimant, respondent and the Fund contending that the date of the accident is the real issue before the Board.
5. Does the Board have jurisdiction over these issues on an appeal from a preliminary hearing Order?

**FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order remains in full force and effect and the appeal of the Midwest Insurance Company should be dismissed.

This matter previously came before the Board on an appeal from the preliminary Order of the ALJ. At that time, the ALJ found that claimant had suffered an accidental injury on May 20, 2009, overruling the objection by the insurance company regarding the stipulated date of accident. An appeal to the Board raised the issues as to what dates claimant had suffered accidental injury while working for respondent. The contention dealt with a dispute over injury dates on May 20, 2009, and June 8, 2009, several days after the insurance coverage by Midwest had ended. A Board Member, in an Order dated January 25, 2010, determined that the Board did not have jurisdiction over a dispute dealing with only the date of accident. The Board Member noted that both dates of accident occurred while claimant was employed by respondent.

On April 23, 2010, a letter from respondent's attorney was provided to board certified orthopedic surgeon John P. Estivo, D.O., asking him to consider medical records, MRI scans and a CT scan of claimant. The letter requests that Dr. Estivo determine whether the incident on June 8, 2009, constituted an injury to claimant or merely an aggravation of her pain complaints with no change in the underlying structure of claimant's cervical spine. If Dr. Estivo agreed with the questions presented, he was asked to sign and date the letter and return it to respondent's attorney, which he did on April 26, 2010. No separate report was generated by Dr. Estivo.

It is still not disputed that claimant suffered an accident on both May 20, 2009, and June 8, 2009. What remains in dispute is the nature and extent of those accidents. Respondent argues that the accident on June 8, 2009, was merely a temporary aggravation of the original injury on May 20, 2009. Midwest, on the other hand, argues that the accident on June 8, 2009, permanently aggravated claimant's earlier injury from May 20, 2009. The ALJ, in the August 10, 2010, Order, determined once again that claimant's date of accident remained May 20, 2009.

#### **PRINCIPLES OF LAW AND ANALYSIS**

The arguments presented by Midwest are almost identical to those previously raised to the Board as listed in its Order of January 25, 2010. The additional evidence provided from Dr. Stein merely clarifies the dispute regarding the effect of the June 8, 2009, accident on the original injury from May 20, 2009.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?<sup>1</sup>

As noted in the January 25, 2010, Order of the Board, in appeals from preliminary hearing orders, the Board does not have jurisdiction to review every alleged error in fact or in law. The date of accident for purposes of determining liability between respondent or its insurance carrier is not an issue that the Board has the authority to review from a preliminary hearing order. Midwest's appeal should, therefore, be dismissed, and the Order of the ALJ remains in full force and effect.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>2</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

#### **CONCLUSIONS**

The Order of the ALJ from August 10, 2010, remains in full force and effect, and the appeal filed by Midwest is dismissed as the Board does not have the authority to review a dispute between respondent and its insurance company regarding the date of accident on appeal from a preliminary hearing order.

#### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated August 10, 2010, remains in full force and effect, and the appeal by Midwest should be, and is hereby, dismissed.

**IT IS SO ORDERED.**

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<sup>1</sup> K.S.A. 44-534a(a)(2).

<sup>2</sup> K.S.A. 44-534a.

Dated this \_\_\_\_ day of November, 2010.

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HONORABLE GARY M. KORTE

c: Phillip B. Slape, Attorney for Claimant  
Vincent A. Burnett, Attorney for Respondent  
Larry G. Karns and Michael P. Bandre, Attorneys for Midwest Insurance Company  
Christopher Cole, Attorney for Kansas Workers Compensation Fund  
Nelsonna Potts Barnes, Administrative Law Judge